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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

22 AMERICAN TRUCKING  
ASSOCIATIONS, INC.,

23 Plaintiff,

24 v.

25 CITY OF LOS ANGELES, et al.,

26 Defendants.

Case No. CV 08-04920 CAS (CTx)

Honorable Christina A. Snyder

**DEFENDANTS' OPPOSITION TO  
THE NATIONAL RETAIL  
FEDERATION MOTION TO  
PARTICIPATE AS *AMICUS CURIAE***

Date: September 8, 2008  
Time: 10:00 am  
Place: Courtroom 5

862000 v1

DEFENDANTS' OPPOSITION TO THE NATIONAL RETAIL FEDERATION  
MOTION TO PARTICIPATE AS *AMICUS CURIAE*

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1 Defendants the City of Los Angeles, the Los Angeles Harbor Department,  
2 the Los Angeles Board of Harbor Commissioners, the City of Long Beach, the  
3 Long Beach Harbor Department and the Long Beach Board of Harbor  
4 Commissioners' (collectively the "Ports") hereby respectfully submit their  
5 Opposition to the National Retail Federation's ("NRF") Motion to Participate as  
6 *Amicus Curiae* ("Motion"). As the Court is aware, Plaintiff American Trucking  
7 Associations' ("ATA") Motion for Preliminary Injunction seeking to enjoin the  
8 Ports' Clean Truck Program's ("CTP") concession contracts is set to be heard on  
9 Monday, September 8, 2008. The NRF seeks to support the ATA's request for a  
10 preliminary injunction. The Ports oppose the NRF's participation at this stage of  
11 the case for the following two reasons:

12  
13  
14 **A. The NRF's brief is untimely and seeks to game the system by**  
15 **denying the Ports adequate time to respond to NRF.**

16 It is well-established in the Ninth Circuit that a "motion for leave to file an  
17 *amicus curiae* brief . . . should not be granted unless the court 'deems the proffered  
18 information timely . . .'" *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982).  
19 Accordingly, NRF's attempts to insert themselves into the preliminary injunction  
20 process nearly two weeks after the ATA filed its complaint and moved for a  
21 preliminary injunction should not be allowed. As Defendants explained to NRF's  
22 counsel, *see* Declaration of Brent Caslin ¶ 3, Ex. B (Steven Rosenthal August 8,  
23 2008 email to Jeffrey Clark), the preliminary injunction briefing schedule and brief  
24 page limits were established prior to the NRF's seeking Defendants' consent to  
25 participate in this case. The Ports made clear to NRF's counsel that there was not  
26 enough time or brief length for the Ports to adequately respond to their proposed  
27 late-filed *amicus* brief and that, therefore, the Defendants' could not consent to the  
28

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1 NRF's request. This is even more true today given the brief NRF lodged with the  
2 Court.

3  
4 Under the guise of seeking "to participate in this case as a friend of the  
5 Court" and to offer a "unique and distinct perspective," Motion at 4:7; 3:11, the  
6 NRF has submitted as exhibits two economic studies of the drayage market at the  
7 Ports, neither of which Plaintiff, American Trucking Associations ("ATA") saw fit  
8 to raise in its Motion for Preliminary injunction. In addition to the supplementary  
9 documentary evidence, the NRF raised a legal argument regarding the "market  
10 participant doctrine" the ATA utterly failed to address in its opening papers.  
11 Finally, the NRF submitted this additional evidence and legal discussion on August  
12 18, 2008 — two days before the Ports' opposition brief was due on August 20,  
13 2008.

14  
15 NRF's tactics can only be intended to game the system and to leave the Ports  
16 with inadequate time to substantively respond to the issues raised by NRF's papers.  
17 NRF's foot-dragging should not be allowed to prejudice defendants at this late  
18 stage of the preliminary injunction process. For this reason alone, NRF's Motion  
19 should be denied and the brief removed from the case record.

20  
21 **B. The NRF's brief does not contribute anything necessary to the**  
22 **resolution of the pending motion for preliminary injunction.**

23 In addition to gaming the system, NRF's brief does not contribute anything  
24 necessary or relevant to the question of whether a preliminary injunction should  
25 issue. As other district courts have observed, *Amicus* "participation at the trial, as  
26 opposed to the appellate level, is more the exception than the rule." *Abu-Jamal v.*  
27 *Price*, 1996 U.S. Dist. LEXIS 8597 (W.D. Pa. 1996); *see also Yip v. Pagano*, 606  
28 F. Supp. 1566, 1568 (D.N.J. 1985) ("[a]t the trial level, where issues of fact as well

1 as law predominate, the aid of *amicus curiae* may be less appropriate than at the  
 2 appellate level where such participation has become standard procedure.”); *News &*  
 3 *Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D. Fla. 1988) (“acceptance of an . .  
 4 . *amicus curiae* should be allowed only sparingly”). *Amicus* participation at the  
 5 preliminary injunction stage is even more exceptional. It is warranted, therefore,  
 6 only when the party seeking *amicus* status can provide special insights specific to  
 7 the injunction under consideration. See *O Centro Espirita Beneficente Uniao do*  
 8 *Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1274 (D.N.M. 2002) (denying an  
 9 organization’s motion to file an *amicus* brief as untimely and unhelpful in deciding  
 10 plaintiffs’ Motion for Preliminary Injunction).

11  
 12 NRF states that it should be granted permission to participate as *amicus*  
 13 because of the “unique perspective that the NRF can bring to this litigation as the  
 14 owners of the beneficial cargo that would bear the brunt of the economic burden of  
 15 the Concession Plans.” This justification presumably explains why NRF submitted  
 16 exhibits regarding recent downward trends in retail sales. While Defendants do not  
 17 comment on whether the NRF has stated adequate grounds to participate in this  
 18 case at the merits stage, or whether evidence of slowing retail sales or other  
 19 testimony regarding economic burdens borne by retailers is ultimately relevant to  
 20 the claims in Plaintiff’s complaint, it is utterly irrelevant to the questions before the  
 21 Court at the preliminary injunction stage, namely: (1) is ATA is likely to succeed  
 22 on the merits of its claims and (2) whether, in balancing the equities, the alleged  
 23 harms to ATA’s members if an injunction does not issue outweighs the harms to the  
 24 Ports in the event an injunction is issued. Certainly, ATA’s counsel alone can  
 25 speak to the harms alleged by ATA members and, with respect to the consideration  
 26 of the merits, the NRF lacks the ATA’s expertise with respect to the federal statute  
 27 at issue. The NRF’s efforts to participate as *amicus* at this stage of the case should  
 28 be denied and their brief removed from the record of this case.

1 For the above stated reasons, Defendants respectfully request that National  
2 Retailers Federation's Motion to Participate as *Amicus Curiae* be denied. If the  
3 Court grants the Motion, Defendants request leave to file a response within two  
4 business days of the order granting the Motion.

5  
6  
7 Dated: August 22, 2008

Respectfully submitted,

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By: /s/

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13 Dated: August 22, 2008

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